

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

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U.S. DISTRICT COURT
SAN JUAN, P.R.

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PUERTO RICO PORTS AUTHORITY

Plaintiff(s)

CIVIL NO. 96-1969 (JAG)

v.

PCI INTERNATIONAL INC., et al

Defendant(s)

OPINION AND ORDER

GARCIA-GREGORY, D. J.¹

On March 23, 2001, defendant Carreras Trucking, Inc. ("Carreras"), moved for partial summary judgement against plaintiff Puerto Rico Ports Authority's ("PRPA") claims, (Docket No. 163). Carreras asks the Court to dismiss PRPA's claims brought under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") since Carreras does not meet the criteria set forth in CERCLA in order to be held liable as a Potentially Responsible Person. PRPA did not oppose Carreras's motion. For the reasons discussed below, Carreras's motion is GRANTED.

FACTUAL BACKGROUND

Carreras is a corporation organized and existing under the laws of Puerto Rico, having its principal place of business in San


¹ Alejandro J. Cepeda-Díaz, a second year student at the University of Puerto Rico School of Law, assisted in the research and preparation of this opinion.

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Juan, Puerto Rico. At all pertinent times, Carreras, being duly licensed by the Public Service Commission, was engaged as an independently contracted carrier for different industrial materials and substances, including caustic soda, to and from various locations in Puerto Rico for industrial use. As part of its business, Carreras has never engaged in transportation of caustic soda to any facility for disposal.



On December 21, 1973, PRPA, as owner of approximately 2.6 acres of land located at the port of Arecibo, Puerto Rico, entered into a standard form land lease agreement with PCI for the period of ten years, with an option to extend. According to Article VII of the agreement, PCI was authorized to install such improvements on the facility as it deemed appropriate or necessary for the receipt, storage, and distribution of liquid chemical waste. Article X of the agreement acknowledged PCI's legal title to such improvements during the lease term. Furthermore, it expressly stated that the legal title to such improvements would be vested on PRPA upon the termination of the contract, except that PRPA could require their removal and/or demolition at PCI's expense.


On or about 1983, PCI constructed and installed at the facility a 1.2 million gallon above ground tank for the receipt, storage, and distribution of rayon grade caustic soda. Upon completion of the tank, PCI entered into agreements with other

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entities for the storage and delivery of caustic soda to and from the tank.

On June 19, 1986, PCI entered into a second standard form agreement with PRPA for the lease of the Arecibo facility for a new term of ten years. This second agreement included the above described elements contained in the December 21, 1973 agreement. During the term periods of both agreements, PCI received only two shipments of caustic soda, one on June 28, 1986 and the other on January 31, 1987. Both shipments were unloaded at the Arecibo port facility under the supervision of PRPA.




On August 6, 1987, PCI and Carreras executed a conditional "Buy and Sell Agreement" whereby, subject to the written consent of PRPA, PCI would assign and transfer to Carreras the lease Agreement with PRPA, along with other specifically described leasehold improvements and inventory, including the 1.2 million gallon tank. Pursuant to Paragraph No. 4, at page 2 of the "Buy and Sell Agreement," (Docket No. 163, Exhibit 9), in the event that PRPA did not provide its written authorization, the "Buy and Sell Agreement" would be deemed "rescinded and without any force or effect or ulterior consequence ... the parties each reverting to the state of affairs existing prior to the execution of the present Buy and Sell Agreement." The condition was due to the language of PRPA's standard form lease agreements, which, specifically precludes any transfer or assignment of the lease or any interest contained

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therein without PRPA's prior written consent. PRPA never issued the written authorization. Therefore, the "Buy and Sell Agreement" between PCI and Carreras was rendered ineffective and was never consummated.

On September 12, 1988, PRPA terminated the second agreement with PCI and advanced PCI's "abandonment of the site" as contractual cause for the termination. In accordance with Article X of the Agreement, on the effective date of termination, legal title to all structural additions or improvements made by PCI, including the 1.2 million gallon above ground tank, vested on PRPA free of any liens and encumbrances.



On or about the early part of 1989, American International Commercial, Inc. ("AIC"), approached PRPA to lease the Arecibo facility. On May 6, 1989, AIC, under the guidance of PRPA, entered into an Option Agreement with PCI for the purchase of all improvements "owned by PCI" at the Arecibo facility at a cost of \$60,000.00. The transaction was subject to PRPA's approval and to PCI's termination of its independent carrier contract.


Meanwhile, after September 12, 1988, Carreras continued to have sporadic access to the Arecibo facility. On August 12, 1989, Carreras advised the Puerto Rico Environmental Quality Board ("EQB") that a release of approximately 20 to 30 gallons of oil had occurred at the site. Carreras immediately undertook efforts to clean the spilled oil from the ground. On January 24, 1990, the

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EQB issued an Administrative Order directing the clean up of the non-hazardous substance. On May 1990, Carreras advised EQB that the clean-up of the spilled oil had been completed. Carreras further informed EQB that an estimated 6,000 gallons of caustic soda remained in the 1.2 million gallon above ground tank and that no activity had been conducted on caustic soda in excess of six months and provided EQB with all the corresponding manifest documents.

To certify the total clean up of the spilled oil to the EQB and PRPA, Carreras contracted Quantum Laboratories ("Quantum"). On July 26, 1990, Quantum submitted an Analysis Report confirming negative results and normal pH background of all corresponding soil samples. Upon completion of the clean up and sampling, Carreras discontinued all access to the site.




On December 4, 1989, PRPA entered into a three year standard form lease Agreement of the Arecibo facility with AIC. The general terms and conditions of the agreement with AIC are essentially identical to those in PRPA's agreements with PCI. On April 10, 1991, PRPA filed an action for eviction and collection of money against AIC pursuant to its default in rent payments and general abandonment of the facility. Furthermore, PRPA sought the confiscation of AIC's compliance bond. On February 19, 1993, a default judgement was entered against AIC.

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Routine inspections of the site by PRPA's Ismael García-Cabrera on July 12, 1993 and December 2, 1993, respectively, revealed that the property was in a state of abandonment and showed evidence of trespassers, but did not show any sign of contamination. Following the inspections, Mr. García recommended that the area be fenced and that proper signs be put up to prevent the entry of trespassers onto the premises.



On January 29, 1994, Mr. García and Mr. José Nora inspected the site and reported that a spill of caustic soda had occurred after the hatch or manhole cover on the 1.2 million gallon above ground tank had been removed. Deposition testimony from Mr. García reveals that during the 1993 inspections it was apparent that cars and trucks could easily enter the site and that the facility was being used as an illegal dump by unknown third parties. Mr. García further testified that the burnt vegetation observed during the January 29, 1994, inspection had not been observed during the 1993 inspections of the same area. Finally, Mr. García testified that his recommendations to PRPA to put up fences and signs had been ignored.

In his testimony, PRPA's Mr. José Nora states that, upon the observed circumstances at the facility on January 29, 1994, it was apparent that the tank's manhole cover had been removed by trespassers and that the first indications of any release or spill of caustic soda at the site were noted on January, 1994. PRPA has

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proffered no evidence even hinting at the possibility of any release or spill of caustic soda at the facility at any time prior to January 1994.

Furthermore, the testimony of Mr. Virgilio Acevedo, Civil Engineer and corporate officer designated by PRPA, acknowledged that if any spill of caustic soda had occurred on or prior to 1990 it would have been detected in the soil samples and pH tests conducted by Quantum Laboratories on May 1990. The testimony of Mr. Acevedo is consistent with that of other PRPA representatives who indicate that the caustic soda spill could not have taken place more than 5 to 12 months prior to its discovery in January 1994.

DISCUSSION

A. Summary Judgment Standard



The court's discretion to grant summary judgment is governed by Rule 56 of the Federal Rules of Civil Procedure. Rule 56 states, in pertinent part, that the court may grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); See Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000).


Summary judgment is appropriate if "there is no genuine issue as to any material fact and ... the moving party is entitled to a

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judgment as a matter of law." Fed.R.Civ.P. 56(c). The party moving for summary judgment bears the burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Once a properly supported motion has been presented before the court, the opposing party has the burden of demonstrating that a trial worthy issue exists that would warrant the court's denial of the motion for summary judgment. For issues where the opposing party bears the ultimate burden of proof, that party cannot merely rely on the absence of competent evidence, but must affirmatively point to specific facts that demonstrate the existence of an authentic dispute. Suarez v. Pueblo Int'l, Inc., 229 F.3d 49 (1st Cir. 2000).



In order for the factual controversy to prevent summary judgment the contested fact must be "material" and the dispute over it must be "genuine." "Material" means that a contested fact has the potential to change the outcome of the suit under the governing law. The issue is "genuine" when a reasonable jury could return a verdict for the nonmoving party based on the evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). It is well settled that "[t]he mere existence of a scintilla of evidence" is insufficient to defeat a properly supported motion for summary judgment." Id., at 252. It is therefore necessary that "a party opposing summary judgment [] present definite, competent evidence


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to rebut the motion." Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994).

To make this assessment in a given case, the court "must view the entire record in the light most hospitable to the party opposing summary judgment, indulging in all reasonable inferences in that party's favor." Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990). When carrying out that task, the court may safely ignore "conclusory allegations, improbable inferences, and unsupported speculation." Medina-Muñoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990).

B. Carreras's motion for summary judgment.



Carreras argues that it can not be held liable for contribution of any response costs incurred in relation to the clean up of the caustic soda spill because it does not meet the required statutory profile under Section 107(a) of CERCLA. Section 107(a), 42 U.S.C. §9607(a), provides that liability may be imposed upon:

- (1) the owner and operator of ... a facility;
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;
- (3) any person who ... arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility... owned

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or operated by another party or entity and containing such hazardous substances; and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by that person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance...

42 U.S.C. §9607(a). Inasmuch as PRPA has proffered no evidence demonstrating, or even alleging, that Carreras was at any time the "owner" of the Arecibo facility or that it arranged for delivery to the facility of any hazardous substance, the Court needs only consider whether Carreras can be held liable as an "operator" or "transporter" as defined in CERCLA.

1. Operator Liability.




CERCLA's definition of "operator" lacks clarity in that it defines the term simply as "any person ... operating such facility." 42 U.S.C. §9601(20)(A). Faced with such a circular definition, the Supreme Court was forced to give the term its "ordinary or natural meaning." See U.S. v. Bestfoods, 118 S.Ct. 1876, 1887 (1998). The Court stated that,

under CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility ... [A]n operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

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Id. The Sixth Circuit adopted an "actual control test" when determining operator liability under CERCLA. "The plain meaning of the term 'operator' as expounded upon in *Bestfoods* does, after all, require that [defendants] have performed some affirmative acts - that they 'operated' the site by 'direct[ing] the workings,' 'manag[ing]' or 'conduct[ing]' the affairs' - before they can be held responsible." U.S. v. Township of Brighton, 153 F.3d 307, 314 (6th Cir. 1998). The Court further states that "before one can be considered an 'operator' for CERCLA purposes, one must perform affirmative acts." Id.



From the evidence on record the Court can not conclude that Carreras ever acted as "operator" of the Arecibo facility as defined by the Supreme Court in Bestfoods. Carreras did make an effort to obtain control over the facility by purchasing from PCI, along with other improvements and inventory, the above-ground tank and by negotiating with PCI for the transfer of the leasehold to Carreras. The agreement, however, was never formalized due to PRPA's failure to issue its written approval as was required, thus, Carreras never obtained control over the facility and its improvements. Therefore, Carreras cannot be held liable as "operator" of the facility as defined in CERCLA.


2. Transporter Liability.

CERCLA defines "transporter" as "any person who accepts or accepted any hazardous substances for transport to disposal or

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treatment facilities, incineration vessels or **sites selected by such person**, from which there is a release..." 42 U.S.C. §9607(a)(4) (emphasis supplied). It is important to note that the definition, as the courts have consistently held, states that transporters can only be held liable when transporting the hazardous substance to, and not from, the disposal facility, and, then, only when the transporter selected, or had substantial influence in the selection process of, the site where the release occurred.² "Under the unambiguous terms of Section 9607(a)(4) and well-settled case law, a person cannot be liable as a transporter unless that person actually selects the site." U.S. v. Petersen Sand & Gravel, Inc., 806 F.Supp. 1346, 1356 (N.D.Ill. 1992) (citations omitted). "As a matter of EPA policy, transporters will not be sent notice letters nor have enforcement actions brought against them as potentially responsible parties until it has been determined that the transporter selected the disposal or treatment facility or other site." U.S. v. Western Processing Company, Inc., 756 F.Supp. 1416 (W.D.Was. 1991) (citations omitted).



The record shows that only two shipments of caustic soda were transported to the facility, one on June 28, 1986, and the other on

² A recent amendment to CERCLA also limits transporter liability when the amount of hazardous substances transported is less than 110 gallons of liquid materials or less than 200 pounds of solid materials. P.L. 107-118, January 11, 2002, 115 Stat. 2356.

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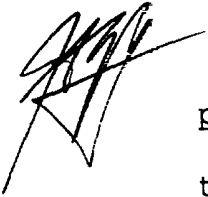
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January 31, 1987. Carreras did not intervene or participate in either of these shipments. Carreras's involvement was limited to the transportation of caustic soda from the Arecibo facility to various locations in Puerto Rico for industrial use. There is no evidence of a release having occurred at any of these locations. Therefore, the Court finds that Carreras cannot be held liable as a "transporter" as defined in CERCLA.

3. Carreras's Abandonment of the Facility.

PRPA further claims that Carreras's abandonment of the site amounted to a "disposal" of the caustic soda. Inasmuch as Carreras was never an "owner" or "operator" of the Arecibo facility, PRPA's claim has no merit against Carreras. Carreras cannot abandon a facility it never owned or operated.

4. Carreras's Third Party Defenses.



Because Carreras's third party defenses are only available to persons designated as Potentially Responsible Persons under CERCLA, the Court need not discuss them.

5. PRPA's Breach of Contract and Tort Claims.

In the alternative, PRPA seeks damages from defendants under Puerto Rico's general tort statute and/or for breach of contract. Inasmuch as a contractual relationship never existed between Carreras and PRPA, breach of contract claims against Carreras are without merit.

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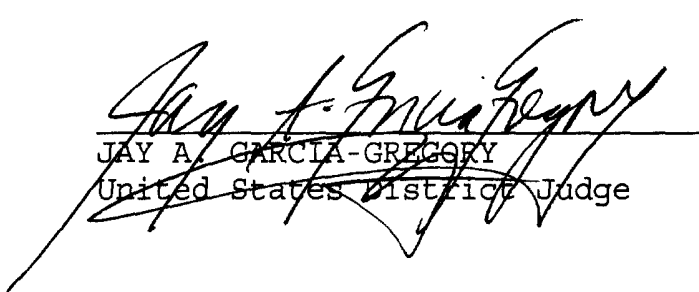
Furthermore, the Court finds that PRPA's tort claims are time barred. This complaint was filed in August of 1996, more than two years after the caustic soda spill was first detected on January of 1994. Any action brought under Puerto Rico's tort claim statute must be filed within one year from the time the injured party had knowledge of the damages. See 31 P.R. Laws Ann. §5298. The period can be tolled if, during that year, the injured party makes any extrajudicial claims. See 31 P.R. Laws Ann. §5303. No evidence has been proffered that could convince the Court that the limitations period was tolled in this case. Because PRPA's tort claims are time barred, they are also dismissed.

CONCLUSION

For the foregoing reasons, Carreras's motion for summary judgment is GRANTED. PRPA's claims against Carreras are dismissed. Partial judgment shall be entered accordingly.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 24th day of April 2002.



JAY A. GARCIA-GREGORY
United States District Judge